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Supreme Court, U.S.

97-509 SEP 18 1997

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No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1997

SUSAN CERWINSKI,

Petitioner,

V.

INSURANCE SERVICES OFFICE, INC.,

Respondent.

On Petition for Writ of Certiorari To the United States Court of Appeals For The Second Circuit

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PETITION FOR WRIT OF CERTIORARI

Susan Cerwinski
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65 pp

QUESTIONS PRESENTED

1. Whether it is discriminatory for an employer to accuse a female employee of being the perpetrator of harassment, if the male employee who made the charge, was making sexual advances and engaging in harassing behavior toward the female employee at the time he made his charge, and the male employee stated his charge was a personal matter that did not belong in the workplace.

2. Whether it was retaliatory to fire the female employee for trying to redress the above accusation.

3. Whether in dismissing Petitioner's complaint it was appropriate for the lower courts to rely upon facts and to make credibility determinations upon which Petitioner was denied an opportunity to conduct full discovery.

4. Whether in dismissing Petitioner's complaint the lower courts applied proper standards in granting defendant's motion for summary judgment.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	1
STATEMENT OF THE CASE	1
REASONS FOR GRANTING THE WRIT....	6
A: Petitioner charged a male co-worker with improper behavior <u>in response</u> to his charge of harassment.....	9
B: ISO denied Petitioner's cross-charge.....	10
C: The appellate court affirmed that the male coworker's behavior was not proper however Petitioner was accused of harassment based on a revised charge upon which she did not conduct discovery.....	10
D: The male coworker said his charge was <u>not</u> a work issue.	

TABLE OF CONTENTS - Continued

Page

Petitioner was therefore discriminatorily accused of of workplace harassment..... 14

E: Petitioner's continued efforts to prove the male coworker's behavior was improper were discriminatorily rejected as non-work issues..... 17

F: ISO fired Petitioner for making a false charge at which time the male coworker was disciplined for improper behavior..... 19

CONCLUSION 23

APPENDIX

Order Denying Petition for Rehearing App. 1

Court of Appeals Decision App. 3

Mandate App.14

District Court Opinion App.15

EEOC Determination App.33

TABLE OF AUTHORITIES

Page

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242;
106 S.Ct. 2505;
91 L.Ed.2nd 202 (1986). 8

Rucker v. Higher Educational AIDS Bd.,
669 F.2d 2279 (1982) 23

NLRB v. Scrivener, 405 U.S. 117,
92 S.Ct. 798,
31 L.Ed. 2d 79 (1972) 23

PETITION FOR A WRIT OF CERTIORARI

The petitioner Susan Cerwinski petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinions of the EEOC, the District Court and the Court of Appeals appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on May 8, 1997. A timely petition for rehearing was denied on June 23, 1997 (App.1) with a Mandate issued June 30, 1997 (App 14). This petition for certiorari was timely filed within 90 days. Jurisdiction of the Court is invoked under 28 U.S.C. Sec. 1254(1).

STATEMENT OF THE CASE

Petitioner was dismissed by her employer, Insurance Services Office ("ISO") on December 4, 1992 for filing a charge against Richard Fernandez ("Fernandez"). When Petitioner was dismissed, ISO told her only that her charge was unsubstantiated.

Plaintiff is petitioning the Court because she was fired for trying to prove

that Fernandez engaged in improper behavior. This is the fundamental act of discrimination that the lower courts have overlooked.

This is a more complicated case than appears. There are two charges and two cross-charges to evaluate: Fernandez' charge of harassment against Petitioner which triggered ISO's involvement in February, 1992; Petitioner's response or cross-charge; Petitioner's subsequent charge against Fernandez in November, 1992; Fernandez' cross-charge. **The lower courts reported facts differently (and often erroneously).**

Both courts acknowledged Fernandez' charge and Petitioner's cross-charge in February (App. 5, 17).

Fernandez' charge of harassment is key because Petitioner based her argument on the merits of his charge, which both courts stated accounted for the differences in the way he and Petitioner were ultimately disciplined (App.10,28).

The appellate court noted in its decision that at the time he made his charge Fernandez had not behaved properly (App.6) and stated in oral argument that he was "no hero."

The district court on the other hand didn't acknowledge that Fernandez' behaved improperly.

Ignoring Petitioner's cross-charge which proved that Fernandez' behavior was not proper, and the fact that Fernandez told ISO that the matter was not work-related (See D. below), both courts concluded that ISO staff (Rebecca "Jones" and Mike "Gallagher") believed that Fernandez' charge that Petitioner was harassing him had merit (App.10, 28, 29).

The district court (without stating why Fernandez' charge was work-related) stated that Petitioner's cross-charge was rejected by Gallagher because it was not work-related. (App. 20/1). The district court assumed that Jones, a friend of Fernandez, mishandled Petitioner's cross-charge (App. 29).

The appellate court did not address why Petitioner's cross-charge, proving that Fernandez had not behaved properly, was rejected by ISO staff when Fernandez made his charge in February.

The appellate court noted that **Fernandez' improper behavior was not acknowledged by ISO until Petitioner made her charge in November at which time he**

was placed on "final warning" (App.6).

The district court on the other hand did not mention that, when Petitioner made her charge in November, ISO placed Fernandez on final warning for improper behavior.

The courts allowed that Fernandez was not fired because his charge that Petitioner was harrassing him in work was found to have merit by ISO staff (App. 6, 10, 28), a fact which is belied by his own statement that the matter was not work-related and by ISO's disciplining him for his improper behavior.

Even though ISO staff disciplined Fernandez, the courts allowed that Petitioner's charge was baseless since it could not be substantiated (App.6,23,24).

Both courts ignored the fact that Petitioner's prior attempts to prove that Fernandez' behavior was improper were rejected by ISO's human resources staff as "personal" (even though Fernandez stated the matter was personal), forcing a choice upon Petitioner to either forego proving Fernandez was "no hero" or to frame her charge in a manner she believed would be acceptable.

Both courts interpreted ISO's rejections as warnings that Petitioner was told she would lose her job if she brought personal matters into work noting that Fernandez (after he got away with improper behavior in February and bringing a personal matter into work) complied with ISO's demand to keep personal affairs out of the office while Petitioner did not (App.6, 11, 21, 28).

However, the appellate court in oral argument stated that Petitioner's November charge was the action that triggered her dismissal, not her communications after she was accused of harassment.

In summary in order to evaluate the merits of Fernandez' charge, it is important to describe his charge: harassment. Petitioner wasn't accused of improper behavior or of misusing ISO's systems. Petitioner was accused of harassing Fernandez in work.

It will become obvious from ISO's statements and the courts' comments below that ISO staff knew that Fernandez was making sexual advances simultaneously to more than one woman in the workplace.

At the time he made his charge, therefore, Fernandez was misusing ISO's systems more extensively than Petitioner to conduct at least two personal affairs, and his behavior was improper, and he accused Petitioner of harassment.

Fernandez was ultimately disciplined for improper behavior when Plaintiff made her charge in November. The issue is did Fernandez' charge of harassment have merit if he engaged in improper behavior at the time he made his charge.

REASONS FOR GRANTING THE WRIT

This is what happened: Based on a conversation with Fernandez, Jones accused Petitioner of harassing Fernandez. Petitioner cross-charged. Jones told Fernandez. Fernandez then called Gallagher and said the matter was not a workplace issue. Gallagher told Petitioner her cross-charge was not based on a workplace issue. Neither Jones nor Gallagher acknowledged Fernandez' improper behavior. When Petitioner insisted that Fernandez' behavior be investigated in November, Petitioner was fired.

The district court set out to prove that ISO staff sincerely believed that

Fernandez' charge had merit, i.e., that Petitioner was harassing him in work. Since Petitioner cross-charged, the district court also had to justify why ISO staff rejected her cross-charge. To do so, the district court ignored any fact that did not support its conclusions, including Fernandez' behavior at the time he made his charge, his statement to Gallagher that the matter was personal, and the fact that ISO finally acknowledged his improper behavior at the time Petitioner made her charge in November.

The appellate court however departed significantly from the district court with regard to Fernandez' behavior by stating that his behavior was not proper; however, it did not examine all of the issues in light of its conclusion that Fernandez behaved improperly.

For example, the appellate court never examined why ISO staff rejected Petitioner's cross-charge since Fernandez' behavior was improper.

Since Fernandez' behavior was not proper and since he stated the matter was not work-related, there was no reason, other than discrimination, to accuse

Petitioner of harassment or to reject Petitioner's cross-charge which proved Fernandez' behavior was not proper.

This Writ should be granted because:

1. The decision by the lower courts to dismiss Petitioner's complaint ignored facts, drew inferences, and made credibility determinations. (See A-F below). However, decisions of other courts and the Supreme Court's interpretation of summary judgment as outlined in Anderson v. Liberty Lobby, Inc., 477 U.S 242,249; 106 S.Ct. 2505, 2511; 91 L.Ed.2nd 202 (1986) have held that a judge's function is not himself to weigh the evidence, make credibility determinations, or draw inferences from the facts. These are jury functions.

2. Petitioner wasn't given the opportunity to conduct discovery on all facts used in the courts' conclusions (see C. below).

3. The decision to dismiss Petitioner's complaint because of a lack of any genuine factual dispute as to whether Petitioner was discriminated against is erroneous (see A - F below).

ISO's case against Petitioner is underlined below:

A. ISO argued that Petitioner at no time filed charges of harassment against Fernandez with any representative of ISO; that it was Fernandez, not Petitioner, who complained to Rebecca Jones of ISO's Human Resources Dept. about Petitioner's unwelcome behavior.

The courts however acknowledged that at the time Fernandez made his charge, Petitioner filed a complaint of harassment in an attempt to prove that Fernandez' behavior was not proper (App. 5, 17), **thus belying ISO's statement A.**

However, instead of acknowledging a dispute about whether or not Petitioner made a cross-charge, the district court misapplied the standard for summary judgment by first, endowing ISO staff with a credibility that is belied by the facts and second, by erroneously concluding that ISO staff mishandled or rejected Petitioner's cross-charge, a conclusion that is belied by ISO's subsequent disciplining of Fernandez for improper behavior. The appellate court, on the other hand, didn't examine why Petitioner's cross-charge was rejected.

B. ISO argued that Petitioner's own E-mail to Fernandez belied any claim she was subjected to unwelcome sexual advances and belied any claim of sexual harassment.

This is an example of the application of a double standard that will be explained in C. below.

C. ISO charged it was Petitioner who was harassing Fernandez since the end of 1989 via E-mail and telephone when she found out he was dating another woman.

This is the charge of workplace harassment that was confirmed during discovery, and verified by Petitioner in depositions of ISO staff. **This is the charge which Petitioner sought to prove had no merit. This, however, is not the charge upon which the courts based their conclusions. Why?**

Using the same logic ISO applied against Petitioner in B. above, Petitioner has proved that this charge has no merit. Petitioner used no circumstantial evidence nor any metaphysical reasoning. Petitioner simply submitted hundreds of cards, photos, E-mails, and phone calls of a lewd, sexual, obscene, or abusive nature

sent to Petitioner by Fernandez **from 1989 into 1992** (App. 17), during the time he claimed Petitioner was harassing him **thus belying ISO's statement C.**

As part of her cross-charge Petitioner also submitted E-mail proving that after she told Fernandez **in 1991** that she didn't want to go out with him if he were dating other women, Fernandez became violently abusive via ISO's E-mail system denigrating Petitioner and calling Petitioner obscenities when Petitioner refused his sexual and monetary demands (App. 17) (**which rendered him "no hero" according to the appellate court.**)

Ignoring the charge as described and underlined in C. above, the district court narrowly restated the description of Fernandez' charge to a complaint by him that Petitioner made insulting phone calls to another woman he was dating, whose employer, IBM, allegedly pursued a complaint against ISO (App. 6, 19), statements which were taken **out of the context of Fernandez' abusive and improper behavior above**, and used to prove Petitioner was guilty of harassing Fernandez (App. 17, 18, 19).

Further, the courts never stated why the matter was a workplace issue. Plaintiff has to assume therefore it is because the courts believed, that ISO staff believed, that Fernandez' statement that IBM was involved, was true.

Petitioner however submitted evidence to prove that ISO staff knew IBM was never involved or would not get involved in a non-work matter (see D. below), which is **exactly the opposite of the courts' conclusion that IBM pursued a complaint against ISO** (App. 6, 19).

Jones' statement that Petitioner admitted she harassed Fernandez (App.19) is belied by Petitioner's cross-charge; Jones also lied about IBM's involvement (see D. below); Jones admitted to being involved in obsessive relationships with men; Jones was doing a favor for Fernandez, her friend (App. 30); Jones never discussed the matter with her supervisor (App. 20); instead Jones wrote to Fernandez, "(Petitioner's) out of town...let's use the time to get the advantage" (a statement ignored by the courts), all of which belie innocent mishandling of Plaintiff's cross-charge.

Instead of acknowledging a dispute

over whether or not Jones was sincere when she denied that Petitioner cross-charged, the district court inferred that Jones' mishandled Petitioner's cross charge, (App. 29) and stated Jones' attempt to help Fernandez (get the advantage) was non-discriminatory.

Most importantly, as Petitioner pointed out in her brief, Petitioner requested during pre-trial discovery to depose any IBM staff allegedly involved in a complaint. ISO opposed Petitioner's request and Petitioner was overruled by the magistrate judge.

Petitioner in pre-trial discovery also wanted to depose several other ISO staff to challenge Jones' and Fernandez' credibility. Petitioner was overruled.

Petitioner was the only woman at ISO ever to have been charged with sexual harrassment. Petitioner in pre-trial discovery requested a review of ISO's discrimination investigations to compare charges involving non-work matters and associated disciplinary action. Again Petitioner was overruled.

Instead of acknowledging a dispute

about IBM's involvement, the courts drew an erroneous and unsubstantiated conclusion about IBM's involvement.

Basing the merits of Fernandez' charge upon non-work matters which occurred within the context of Fernandez' sexual and monetary demands and frequent use of violent and obscene language, improperly affected the determination of the materiality of the facts as to the merits of his charge of harassment.

Petitioner did not have a full opportunity to conduct discovery on IBM's involvement, ISO staff's and Fernandez' credibility, or other investigations of discrimination at ISO which made it impossible for her to present affirmative evidence to defeat summary judgment.

D. ISO argued that Fernandez' charge was found to have merit and that Petitioner was the perpetrator of harassment.

What happened to Petitioner's cross charge? The appellate court didn't say. The district court noted that Petitioner requested to speak with Jones' superior, Marlene Reisman, about the matter. Jones then informed Fernandez (App.20) (not her superior or Gallagher). The district court

erroneously concluded that it was Jones who initially contacted Gallagher (App.20). It was Fernandez who went over Reisman's head and called Mike Gallagher, Reisman's boss. ISO reported this call in its report to the EEOC as follows: **"Fernandez recognized that this was a personal matter and should not be pursued in work."** Gallagher's notes, submitted during discovery, confirm this, **thus belying Jones' statements about IBM pursuing a complaint against ISO.**

The courts ignored the fact that Fernandez stated there was no legitimate business reason for his charge, **thereby belying ISO's statement D.**

Gallagher admitted in his deposition that he did not verify any of Fernandez' statements against Petitioner (**a fact which the courts ignored.**)

The District Court (**forgetting ISO denied that Petitioner cross-charged and ignoring Fernandez' E-mail to Petitioner**) concluded that Gallagher rejected Petitioner's cross-charge because it was based on a "failed" relationship and not on any legitimate business reason (App. 20/1).

The courts therefore allowed that

ISO staff sincerely believed that Petitioner was harassing Fernandez in work even though Gallagher was told by Fernandez that it was a personal matter and did not belong in work.

Any sincerity of belief in Fernandez is belied by Gallagher's reporting Fernandez' improper behavior to Jim Langell, Gallagher's boss, when Petitioner made her charge in November.

Second, the district court incorporated ISO's double standard into its logic: while Fernandez stated his charge was a personal matter that should not have been pursued in work, Petitioner's cross-charge proving that Fernandez engaged in improper behavior was rejected as a personal matter.

Third, the district court improperly concluded that Petitioner's attempts to prove that Fernandez engaged in improper behavior were sincerely rejected when in fact they were discriminatorily rejected after Fernandez said his charge did not belong in the workplace. **Had Petitioner's cross-charge not been rejected, Fernandez' improper behavior would had to have been acknowledged at the time he brought his charge, which it never was.**

Other courts (and ISO in its arguments against Petitioner in B. above) have held that a charge of harassment must be evaluated within the context of all related incidents--in this case Fernandez' improper behavior toward Petitioner at the time he made his charge which Petitioner documented in her cross-charge. **Petitioner therefore believes a genuine issue exists as to whether ISO discriminatorily rejected her cross-charge and labelled Petitioner the perpetrator of harassment.**

E. ISO argued that Petitioner was told not to use E-mail or bring a personal matter into work.

The district court stated that despite Gallagher's belief Petitioner was at fault, he dealt with Petitioner and Fernandez equally since he told both not to bring the matter into work (App. 30).

First Fernandez continued to bring personal matters into work since the IBM rep continued to visit him during working hours while not assigned to the ISO account. The court erred in stating she was assigned to the account (App. 22).

Second, Gallagher accused Petitioner of harassment and did not acknowledge

Fernandez' improper behavior, which belies any claim to equal treatment.

Since the district court ignored Fernandez' improper behavior and the fact that Fernandez said the matter was personal, it concluded that Petitioner was "at fault," and blamed Petitioner for "rehashing" a personal matter (App. 22). The fact is Petitioner had no way of addressing a personal matter without "rehashing" a personal matter.

The appellate court indicated that there was bad blood between Fernandez and Petitioner over the dissolution of our involvement in 1990 (App.5). The court did not explain why Fernandez was making sexual and monetary demands in 1992.

A more accurate assessment would have been that the dissolution of the involvement was communicated to Petitioner in 1992 by Jones as a personal favor to Fernandez. The dissolution and the charge of harassment were one and the same. The courts did not question whether ending an involvement in this fashion was "normal."

The courts seem to have held that ISO staff could intervene in a private matter to an appalling degree to accuse

Petitioner of workplace harassment.

As discussed above, Gallagher accused Plaintiff of workplace harassment even though Fernandez told him the matter was not workplace harassment. The district court acknowledged that ISO staff didn't explain why Fernandez' charge was a business matter and Petitioner's charge was a personal matter (App. 21).

And finally, the appellate court noted in oral argument that Petitioner was fired when she made her charge in November, not when she contacted Fernandez or ISO staff after being accused of harassment.

Because Fernandez engaged in improper behavior, the courts should have acknowledged the existence of a controversy over what Petitioner was told when her cross-charge was rejected. Instead the courts faulted Petitioner for continuing to pursue the matter (App 6, 28).

F. ISO then argued that Petitioner's subsequent charge against Fernandez in November, 1992, had no merit and forced ISO to use its resources to investigate Petitioner's complaint

while Petitioner was herself abusing ISO's E-mail systems.

First, the courts ignored the fact that Fernandez (while extensively abusing ISO's E-mail systems to conduct simultaneous personal affairs) involved two of ISO's Human Resources staff in several meetings and conversations concerning a charge that he stated "should not be pursued in work."

Why did Petitioner bring a formal charge against Fernandez in November?

After Fernandez made his charge, Petitioner, because of her continued contact with Fernandez, learned that (unbeknownst to Petitioner) he began co-habitating with the IBM rep after Petitioner said she didn't want to go out with him if he were dating other women.

Petitioner realized therefore that **Fernandez' ongoing** sexual and monetary **demands followed by abusive language** (which included disparaging Petitioner to her staff; making fun of Petitioner's looks, her age; her ethnic background; her personality, her unnattractiveness, etc., **when Petitioner refused to go along with his requests**) could, in no way, be interpreted as misguided attempts to get

Petitioner involved in a relationship with him and were therefore purely abusive; and, further that his charge of harassment was an attempt to extricate himself without blame from having conducted this abusive campaign against Petitioner in work during 1991/2.

Petitioner tried to explain Fernandez' improper behavior via E-mail in August, 1992, but her efforts were rejected as personal.

As instructed by Gallagher, Petitioner then selected what she believed was a business or non-personal issue and brought it to the attention of Fernandez' management (App.22). Petitioner had E-mail from Fernandez stating (within the context of his making sexual and monetary demands) that he knew Petitioner's current salary. He sent this E-mail during the time he claimed Petitioner was harassing him, so it belied his charge of harassment.

Gallagher was assigned to investigate Petitioner's charge (App.23). He knew Petitioner had tried previously to prove Fernandez' behavior was not proper. However, Gallagher communicated to his inexperienced co-investigator only that

Petitioner was obsessed and conducting a vendetta (App. 23/4).

In response to Petitioner's charge, Fernandez claimed he did Petitioner's tax projections (App. 6, 23), which Petitioner proved was a lie. Petitioner also proved that salaries cannot be projected. Gallagher never corroborated any of Fernandez statements with Petitioner, (**a fact which was ignored by the courts**). Petitioner was dismissed for bringing a false charge.

The appellate court noted however that Fernandez was disciplined for engaging in improper behavior back when he made his February charge (App. 6).

The courts ignored the fact that ISO's disciplinary action of Fernandez represented a complete reversal of its characterization of him up to the point Petitioner made her charge in November.

The courts allowed that since Petitioner sent personal mail to Fernandez at home and/or contacted him via E-mail there was evidence to support ISO's belief that her charge was a pretext for continued harassment(App.30).

But the courts once again incorporated ISO's double standard

into their conclusions. In an attempt to prove that Fernandez' own charge in February was not a pretext for harassing Petitioner, ISO--in a statement of operatic cynicism--argued that the district court was appropriate in dismissing all of Fernandez' lewd and abusive mail and E-mail to Petitioner because it occured before Petitioner was "warned" and therefore occured when the relationship was consensual, a fact belied by Petitioner's cross-charge.

CONCLUSION

As stated in Rucker v. Higher Educational AIDS Bd., 669 F.2d 1179, 1182 (1982) "..this is (a) retaliation case in a more fundamental sense than the usual case where an employee is fired for having made a charge of discrimination that didn't stick. ...we think an a fortiori violation of section 2000-3(a) is committed when an employee opposes an attempt to discriminate...so successfully that the employer desists from the attempt and then fires the (employee) for what he had done."

Further, the Supreme Court in NLRB v. Scrivener 405 U.S. 117, 92 S.Ct. 798, 801-2, 31 L.Ed. 2d 79 (1972) held that

the language of a statue should not be read strictly but should be read more broadly if such a reading was also consistent with the purpose and objective of the prohibition made by the statute.

Petitioner tried to oppose an unlawful employment practice under Title VII--that her employer's accusation that she was the perpetrator of harassment was discriminatory and its rejection of her cross-charge proving Fernandez engaged in improper behavior was discriminatory. Even though her charge didn't stick, it was intended to conform with her employer's requirements and it did prove Fernandez' behavior was improper and that his charge of harassment had no merit. There was therefore a causal link between the way Petitioner framed her charge and the unlawful practice Petitioner was trying to remedy. Petitioner's dismissal was therefore retaliatory and the courts decision to dismiss Petitioner's case because of a lack of any genuine material fact as to discrimination should be reversed and this Writ of Certiorari granted.

Respectfully submitted,
Susan Cerwinski

9/15/97

UNITED STATES COURT OF APPEALS
for the Second Circuit
United States Court House
40 Foley Sq.
New York 10007

George Lange III
Clerk

Docket No. 96-9368
(Filed June 23, 1997)

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the twenty-third day of June one thousand nine hundred and ninety-seven.

Present:

Hon. Roger J. Miner
Hon. Guido Calabresi,
Circuit Judges,
Hon. Milton I. Shadur,
District Judge.

Susan Cerwinski,

Plaintiff-Appellant,

v.

Insurance Services Office, Inc.

Defendant-Appellee.

A petition for rehearing having been filed herein by pro se appellant Susan Cerwinski,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is **DENIED.**

FOR THE COURT

GEORGE LANGE III,CLERK

By: /s/ Beth J. Meador,

Administrative Attorney

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the city of New York, on the 8th day of May, one thousand nine hundred and ninety-seven.

PRESENT:

HON. ROGER J. MINER
HON. GUIDO CALABRESI,
Circuit Judges,
HON. MILTON I. SHADUR,
District Judge.*

*The Honorable Milton I. Shadur, Senior District Judge of the United States District Court for the Northern District of Illinois, sitting by designation.

SUSAN CERWINSKI,
Plaintiff-Appellant, **ORDER #96-9368**
v.
INSURANCE SERVICES OFFICE, INC.
Defendant-Appellee. **FILED 5/8/97**

Appearing for Appellant:
SUSAN CERWINSKI, pro se,
New York, N.Y.
Appearing for Appellee:
PAUL J. SIEGEL, Jackson, Lewis
Schnitzler & Krupman,
New York, N.Y.

UPON CONSIDERATION of this appeal from a judgment of the United States District Court for the Southern District of New York (Martin, J.), it is hereby

ORDERED, ADJUDGED, AND DECREED that the judgment be and it hereby is AFFIRMED.

Susan Cerwinski, pro se, appeals from an October 4, 1996 judgment of the United States District Court for the Southern District of New York (Martin, J.) granting the defendant's motion for

summary judgment and dismissing Cerwinski's employment discrimination claim.

Background

In 1992, Cerwinski was terminated from her position as Assistant Vice President of Corporate Marketing by defendant Insurance Services Office, Inc. ("ISO"). Her termination was the result of the bad blood that followed the dissolution of her 1989-1990 romantic involvement with Richard Fernandez, the Assistant Vice President of Operations and Technology at ISO. Claiming that Fernandez began harassing her after their relationship was severed, Cerwinski filed an informal complaint with ISO's human resources department. Fernandez, on the other hand, alleged that it was he who was being harassed and Cerwinski who was doing the harassing.

ISO's investigation disclosed the following facts, none of which are disputed by Cerwinski: 1) While Cerwinski and Fernandez were dating, Fernandez also being seeing Lynn Daniello, the IBM representative to ISO; 2) When she

learned of this relationship Cerwinski made personal phone calls and sent personal E-mails to Fernandez criticizing Daniello; 3) Cerwinski also telephoned Daniello at IBM about Fernandez; 4) As a result of the unwanted personal contact between Cerwinski and Daniello, IBM pursued a complaint against ISO; 5) Cerwinski then filed charges falsely accusing Fernandez of wrongly obtaining confidential information about her, namely her salary figure*; and 6) ISO was forced to warn Cerwinski on a number of occasions that she would lose her job if she continued to bring personal matters into the workplace. In short, ISO's investigation revealed that while Fernandez had not behaved properly (and accordingly was placed on "final warning" status), it was Cerwinski who continued to pursue personal matters in the workplace, going so far as to file a false claim of harassment against

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*In fact, Fernandez obtained that figure when he did Cerwinski's taxes for her, with her permission.

Fernandez. On that basis, ISO terminated Cerwinski.

Claiming that she had been fired both because of her gender and in retaliation for her having lodged a complaint with ISO's human resources department, Cerwinski filed charges of discrimination with the Equal Employment Opportunity Commission ("EEOC"). On January 17, 1995, the EEOC found no discrimination, concluding instead that Cerwinski "was discharged because of improper use of E-mail and the filing of unfounded claims of business improprieties against the same individual she alleged harassed her."

On the ground that she had been discriminated against in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Sec. 2000e et seq., Cerwinski filed suit in federal court on March 15, 1995. In October 1996, the district court granted ISO's motion for summary judgement. See Cerwinski v. Insurance Servs. Office, No. 95 Civ. 1766, 1996 WL 562988 (S.D.N.Y. Oct. 3, 1996). This appeal followed.

Discussion

Summary judgment is proper when "there is no genuine issue as to any material fact and...the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A dispute regarding a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 248 (1986). Thus, "(i)f, as to the issue on which summary judment is sought, there is any evidence in the record from which a reasonable inference could be drawn in favor of the opposing party, summary judgment is improper." Gummo v. Village of Depew, 75 F.3d 98, 107 (2nd Cir.), cert. denied, 116 S.Ct. 1678 (1996). The party seeking summary judgment bears the burden of demonstrating the absence of any genuine factual dispute. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

We review a grant of summary judgment de novo, drawing all factual inferences and resolving all ambiguities

in favor of the nonmoving party. See, e.g., Gummo, 75 F.3d at 107. Applying that standard, we affirm the district court.

Under the familiar three-step burden shifting analysis, a plaintiff seeking to prove discrimination in violation of Title VII must first establish a prima facie case. If the plaintiff is able to do so, the burden of production shifts to the defendant to articulate a legitimate, non-discriminatory reason for terminating the plaintiff. The plaintiff then has the burden of proving that the employer's proferred reasons were pretextual, as well as the ultimate burden of showing discrimination. See, e.g., Holt v. KMI-Continental, Inc. 95 F.3d 123, 129 (2d Cir. 1996), petition for cert. filed 65 U.S.L.W. 3572 (U.S. Feb. 10, 1997) (No. 96-1260).

Assuming, as the district court did, that Cerwinski has proven a prima facie case of discrimination, it is clear that the defendant has offered legitimate non-discriminatory reasons for Cerwinski's termination. In the words of the EEOC,

Cerwinski "was discharged because of improper use of E-mail and the filing of unfounded claims of improprieties against the same individual she alleged harassed her."

In response to ISO's proffered reasons for her discharge, Cerwinski asserts that pretext can be shown primarily by the fact that Fernandez, who was also guilty of bringing his personal disputes into the workplace, was not terminated. But "differences in treatment are only probative...if such individuals are similarly situated to the plaintiff." Melnyk v. Adria Lab., 799 F.Supp. 301, 316 (W.D.N.Y. 1992). Fernandez's charges of harassment, unlike Cerwinski's were found to have merit. And even if that finding was in error (as Cerwinski seems to be alleging), in order to show pretext Cerwinski must provide evidence that ISO did not believe its finding. Cf. Agugliaro v. Brooks Bros. Inc., 927 F. Supp. 741, 747 (S.D.N.Y. 1996) ("Even assuming defendants were wrong in their belief that plaintiff had engaged in sexual misconduct, what is

significant is that they based their decision to dismiss plaintiff on that belief, and not on his age, gender, or pension status."); Waggoner v. City of Garland, 987 F.2d 1160, 1165 (5th Cir. 1993) ("The real issue is whether the employer reasonably believed the employee's allegation and acted on it in good faith, or to the contrary, the employer, did not actually believe the co-employee's allegation but instead used it as a pretext for an otherwise discriminatory dismissal.") This she has failed to do. Moreover, Fernandez, unlike Cerwinski, complied with ISO's demand to keep personal affairs out of the office after having been warned. Under the circumstances, no inference of pretext can be drawn from ISO's refusal to terminate Fernandez.

"In order to survive a motion for summary judgment, at the third step plaintiff must put forth adequate evidence to support a rational finding that the legitimate non-discriminatory reasons proffered by the employer were false, and that more likely than not the

employee's sex...was the real reason for the discharge." Holt, 95 F.3d at 129. Cerwinski has failed to produce evidence suggesting pretext or impermissible discrimination such that a rational finder of fact could make a sustainable finding of discrimination. Summary judgment is therefore appropriate. See Hayes v. New York City Dep't. of Corrections, 84 F. 3d. 614, 619 (2nd Cir. 1996). ("{W}here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial.") (quoting Matsushita Elec. Ind. Co. v. Zenith Radio, 475 U.S. 574, 587 (1986)) (internal quotation marks and alterations omitted.) We have examined all of Cerwinski contentions. In the end, the issue before us in this case is this: is there any evidence that if Fernandez were a woman and Cerwinski were a man, the employer would have acted any differently? There being no such evidence, the district court's judgment is affirmed.

/s/ Hon. Roger J. Miner

/s/ Hon. Guido Clabresi

Circuit Judges,

/s/ Hon. Milton I. Shadur

District Judge

MANDATE

(ISSUED 6/30/97)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the city of New York, on the 8th day of May, one thousand nine hundred and ninety-seven.

PRESENT:

HON. ROGER J. MINER
HON. GUIDO CALABRESI,
Circuit Judges,
HON. MILTON I. SHADUR,
District Judge.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SUSAN CERWINSKI

Plaintiff, 95 Civil 1766(JSM)

-against- **JUDGMENT**

INSURANCE SERVICES OFFICE,

Defendant. **FILED Oct. 4, 1996**

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Defendant having moved for summary judgment and the said motion having come before the Honorable John S. Martin Jr., United States District Judge, and the Court thereafter on October 3, 1996, having rendered its Opinion (77403) and Order, granting the defendants' motion, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Opinion (77403) and Order of October 3, 1996, defendant's motion for summary judgment is hereby granted.

DATED: New York, New York
October 4, 1996

JAMES M. PARKISON
Clerk of the Court
BY: /s/ Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SUSAN CERWINSKI

Plaintiff,

-v.-

INSURANCE SERVICES OFFICE

Defendant.

----------X

95 Civ. 1766(JSM)

OPINION & ORDER

JOHN S. MARTIN, JR., District Judge:

Pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Sec. 2000e, et seq ("Title VII"), plaintiff, Susan Cerwinski, filed a pro se complaint for employment discrimination based on gender. This action is before the Court on defendant's motion for summary judgment pursuant to Fed. R. Civ. P. 56. For the reasons stated below, the motion is granted.

BACKGROUND AND FACTS

Plaintiff, Susan Cerwinski was employed by defendant, Insurance Services Office ("ISO"), from October 1979 until December 1992. At the time of her discharge, Cerwinski was the Assistant Vice-President of the Corporate Marketing

department. In 1989 Cerwinski became romantically involved with Richard Fernandez, an Assistant Vice-President of Operations and Technology at ISO. Their relationship was ended by Fernandez in the spring of 1990.

Towards the end of that summer Fernandez began dating Lynn Daniello, who was employed by IBM to handle ISO's account. According to Cerwinski, Fernandez began to harass her in April 15, 1991 by asking her out, sending her sexually suggestive photographs, cards and notes. In electronic mail messages ("E-mail") from Fernandez to Cerwinski, Fernandez also asked her to loan him money and to make certain financial investments. Cerwinski claims that this conduct continued until February or March 1992.

ISO contends, however, that Cerwinski was the source of the harassment. Fernandez claims that Cerwinski also sent him harassing E-mail. Cerwinski admits to placing a call to Daniello from ISO on October 8, 1991 to ask about Daniello's relationship with

Fernandez. Cerwinski claims that this was the only time she ever called Daniello. This contention, however, is belied by Cerwinski's admissions.*

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*In an E-mail message to Fernandez dated August 20, 1992, 08:15:29, Cerwinski stated:

(I) just found out yesterday that you lied to Mike Gallagher and me about your situation with Lynn Daniello -- that you had in fact not just been seeing her but living with her for a couple of months prior to the time (I) placed my nutty phone call to her ... (I) thought she brought my calls to ISO's attention without your possibly knowing about it...

In a message to Rebecca Jones dated August 25, 1992, 14:04:28, Cerwinski stated:

(A)re you saying it's ok for ... (Fernandez) to lie, to say the things that he did, to use work as a cover for insinuating his way into my life, and that (I)'m the one who's going to get in trouble because (I) made a few nasty phone calls?"

In February 1992 Fernandez complained to Rebecca Jones, ISO's Group Manager of Human Resources, that Cerwinski left an insulting phone message on Daniello's IBM voice mail. Daniello also complained to representatives at IBM who called Jones. Jones claims that Cerwinski admitted that she had harassed Daniello and Fernandez but stated that she was justified because Fernandez lied to Cerwinski about his relationship with Daniello. Based on these admissions Jones concluded that Fernandez' complaints were valid. Jones called IBM and told them that Cerwinski had in fact made the calls but that she promised to stop. Jones then proceeded to counsel Cerwinski by urging her to leave Fernandez and Daniello alone and to keep such matters out of the office. Jones claims that she did not open a formal investigation into the matter or report it to her supervisors because she did not want to jeopardize either Fernandez or Cerwinski's careers.

Cerwinski denies make the phone call and claims that Jones refused to let her

answer the charges made against her. Cerwinski argues that Fernandez made the complaint to deflect attention from his harassment. Cerwinski also claims that Jones ignored her complaints about Fernandez and Daniello.

In an E-mail to Jones dated April 3, 1992 Cerwinski allegedly expressed her dissatisfaction with the fact that IBM's complaint against her had not been addressed openly. Cerwinski asked Jones to discuss the matter with Jones' supervisor, Marlene Reisman. Jones forwarded a copy of this message to Fernandez.

However, Jones claims that Cerwinski's refusal to let the matter die prompted her to report the matter to Michael Gallagher, Assistant Vice President of Human Resources. Around this same time, Fernandez also complained to Gallagher that Cerwinski was continuing to harass him.

After speaking informally with Cerwinski, Gallagher concluded that her complaints against Fernandez were based on the failed relationship and not any

legitimate business reasons. On April 15, 1992, Gallagher met with both Fernandez and Cerwinski and told them not to use ISO equipment for personal communications and to keep personal matters out of the office. Cerwinski claims that they were never told not to use ISO equipment and that while they were advised to keep personal matters out of the office, there was no clarification as to what was a personal as opposed to a business matter. Following this meeting, Fernandez called Gallagher, thanked him for the intervention and advised him that he would not pursue the matter with his lawyer. Cerwinski sent Gallagher and E-mail in which she continued to discuss the situation but assured Gallagher that she would have no problems "walking away." She also thanked Gallagher and Jones for their intervention and praised their handling of the situation.

Fernandez claims that Cerwinski continued to harass both him and Daniello at home and at work. Cerwinski denies this allegation but ISO has submitted an E-mail from Cerwinski to Fernandez dated

August 20, 1992 8:15:29, in which Cerwinski accuses Fernandez of lying to Gallagher and rehashes their failed relationship. Also in August 1992, Cerwinski began complaining to Jones about Daniello's presence in the office. Cerwinski objected to the fact that Daniello had been visiting Fernandez at ISO during office hours and answering the phones as if she were an ISO employee. Jones, however, concluded that, as an IBM representative handling the ISO account, Daniello had a right to be on the premises and to answer the IBM phone.

On November 17, 1992, Cerwinski sent an E-mail to Sandy Steinmetz, ISO's Vice-President of Operations and Technology and Dominick Cortellessa, ISO's Executive Vice President, accusing Fernandez of accessing confidential ISO files. As proof, Cerwinski claimed that in a September 1991 E-mail, Fernandez quoted her 1991 salary. Cerwinski denied ever telling Fernandez her salary, though she admitted that he did have access to some of her financial information since he had prepared her tax returns in 1990.

Fernandez also allegedly knew information regarding other employees performance ratings and grade levels.

James Langell, Senior Vice President of ISO, instructed Gallagher and Denise Meyer, a newly hired attorney in ISO's Legal Department, to conduct an investigation. Gallagher admits telling Meyer that he thought Cerwinski was obsessed with Fernandez and had brought the charges because of the failed relationship.

Gallagher and Meyer interviewed Cerwinski about the allegations against Fernandez, as well as about her feelings towards him and their past relationship. Fernandez was also interviewed and explained that he had done tax projections for Cerwinski in late 1990 or early 1991 in addition to her tax returns. Fernandez denied having access to other confidential information about employees. He also informed Gallagher and Meyer that Cerwinski was continuing to harass him outside of the office and that she had also left messages for Daniello at work and contacted his brother and

Daniello's ex-husband.

Gallagher and Meyer concluded that Cerwinski's charges were unfounded and a pretext for continued harassment of Fernandez. They then reported these findings to Langell who made the decision to terminate Cerwinski.

Cerwinski filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("the EEOC") alleging that she had been discriminatorily discharged on the basis of her gender because she had filed the November 1992 complaint against Fernandez.* The EEOC determined that Cerwinski had not been the victim of discrimination. Subsequently, Cerwinski commenced this action.

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*Cerwinski did not seek to hold ISO liable for Fernandez' alleged acts of harassment between April 1991 and March 1992 because such conduct was not actionable since it occurred more than 300 days prior to Cerwinski's filing of a complaint with the EEOC on August 3, 1993.

DISCUSSION

Summary judgment will be granted when there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In deciding whether a genuine dispute remains as to a material fact, the court must view the evidence before it in the light most favorable to the nonmovant, Weg v. Macchiarola, 995 F.2d 15, 18 (2d Cir. 1993), drawing all justifiable interences in the nonmovant's favor, Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 255 (1986). Summary judgement is appropriate if no reasonable trier of fact could find in favor of the nonmoving party. Cruden v. Bank of New York, 957 F.2d 961, 975 (2nd Cir. 1992).

Under Title VII, it is unlawful for an employer to "fail to hire or refuse to hire or to discharge any individual ... because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. Sec. 2000e-2(a)).

A Title VII plaintiff has the

initial burden of proving a prima facie case of discrimination. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-53, 101 S.Ct. 1089, 1093, 65 L.Ed.2d. 207 (1981). To establish a prima facie case of discriminatory termination a plaintiff mush show (1) that she belong to a protected class; (2) that she was performing her duties satisfactorily; (3) that she was discharged; and (4) that the circumstances under which she was discharged give rise to an inference of discrimination. See, e.g., Chambers v. TRM Copy Centers Corp., 43 F.3d 29, 37 (2d Cir. 1994). At the prima facie stage a plaintiff's burden of proof is de minimis. Dister, 859 F.2d at 1114.

If the plaintiff meets her burden, the defendant must "articulate some legitimate, nondiscriminatory reason for the employee's" termination. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973). If the defendant succeeds in rebutting the presumption raised by the prima facie case, plaintiff must show

that the proffered reason was merely a pretext for discrimination. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S.Ct. 2742, 2749, 125 L.Ed.2d 407 (1993) (quoting Burdine, 450 U.S. at 256, 101 S.Ct. at 1095). Pretext may be proven directly by showing that discrimination was a motivating factor in the decision to terminate, Burdine, 450 U.S. at 256, 101 S.Ct. at 1095; Cronin v. Aetna Life Insurance Co., 46 F.3d 196, 203 (2nd Cir. 1995), or indirectly by introducing evidence which shows that the defendant's proffered reason is unworthy of credence. Hicks, 113 S.Ct. at 2749; Binder v. Long Island Lighting Co., 57 F.3d 193,199,200 (2d Cir. 1995); Chambers, 43 F.3d at 38.

Assuming without deciding that Cerwinski established a prima facie case of discrimination, ISO had a legitimate nondiscriminatory reason for firing her -- she filed unfounded charges against Fernandez and continued to bring the issue of her prior relationship with Fernandez into the office.

Cerwinski first attempts to prove pretext based on the fact that Fernandez

was not discharged after ISO became aware of the E-mail he sent to Cerwinski in 1991 and early 1992. However, "differences in treatment are only probative on the question of discrimination if such individuals are similarly situated to the plaintiff." Melnyk v. Adria Lab., 799 F.Supp. 301, 316 (W.D.N.Y. 1992).

There are obvious differences between Fernandez' conduct and Cerwinski's conduct that account for the way they were ultimately disciplined. Cerwinski was terminated for filing false charges against Fernandez. The February 1992 complaint by Fernandez against Cerwinski, however, was found to have merit. Moreover, after being warned in April to keep their prior relationship out of the office, Fernandez complied with this directive. In fact, Cerwinski admits that Fernandez stopped contacting her in February or March of 1992. She, however, disobeyed Gallagher's warning. The fact that Cerwinski was not given a written warning is of no consequence since there is nothing to indicate that

Fernandez was warned in writing. Thus, Cerwinski's argument fails.

Cerwinski also seeks to show pretext by accusing ISO of unfairly misjudging her and mishandling her claim. However, "(a)bsent discrimination, the employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or no reason at all..." Mohamed v. Marriott Int'l, Inc., 905 F.Supp. 141, 155 (S.D.N.Y. 1995) (quoting Nix v. WLCY Radio/Rahall Communications, 738 F.2d 1181, 1187 (11th Cir. 1984). Since Cerwinski raises no issues of fact with regards to whether the reasons given for her termination were a pretext for gender discrimination, ISO is entitled to summary judgment.

Cerwinski claims that Jones mishandled the initial investigation of Cerwinski's and Fernandez' cross complaints of harassment. Assuming this is true, there is no evidence that discriminatory animus played a role in Jones' conclusion that Cerwinski was the perpetrator of the harassment. Cerwinski herself attributes Jones' conduct to the

fact that Jones and Fernandez were friends. Alternatively, Cerwinski accepts Jones' contention that she was reluctant to involve her superiors because her feelings were clouded by her prior obsession over a failed relationship. There is no evidence, however, that Jones, a woman, discriminated against Cerwinski on the basis of gender.

Cerwinski also takes issue with Gallagher's intervention in April, 1992. Despite Gallagher's belief that Cerwinski was at fault, he dealt equally with Cerwinski and Fernandez. Both were admonished to keep the matter out of the office. Cerwinski's August 20th E-mail to Fernandez indicates that she ignored this warning. With respect to Cerwinski's November 1992 complaint against Fernandez, Gallagher and Meyer reasonably concluded after interviewing both parties that Cerwinski had made unfounded charges and was continuing to harass Fernandez in the office. Langell based his decision to terminate Cerwinski on these conclusions. There is nothing

to indicate that Cerwinski was fired for any other reason.

Even if ISO was ultimately wrong in its conclusion, there was sufficient evidence for it to find that Cerwinski had made baseless charges against Fernandez as part of a continuing pattern of harassment at the office after being advised and then warned to refrain from such conduct during office hours. As long as this is in fact the reason that Cerwinski was terminated, then "(n)o matter how medieval...ISO's practices, no matter how high handed its decisional process, no matter how mistaken the firm's managers" Cerwinski cannot proceed with her claims. Elrod v. Sears, Roebuck and Co., 939 F.2d 1466, 1470 (11th Cir. 1991) quoted in Mohamed, supra, 905 F.Supp. at 155. See also Agugliaro v. Brooks Brothers Inc., 927 F.Supp. 741 (S.D.N.Y. 1996) (finding that as long as employer fired plaintiff based on good faith belief that he was guilty of sexual harassment, it did not matter whether he was actually guilty of such conduct).

CONCLUSION

For the foregoing reasons, defendant's motion for summary judgment is granted.

SO ORDERED.

Dated: New York, New York
October 3, 1996

/s/ JOHN S. MARTIN JR., U.S.D.J.

U. S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION - NEW YORK DISTRICT OFFICE

7 World Trade Center, NYC 10048

Charge No. 16G-93-0202

Susan Cerwinski
42 West 13th Street, Apt. 6F
New York, New York 10011

Charging Party

Insurance Services Office
7 World Trade Center
New York, New York 10048

Respondent

DETERMINATION

On behalf of the Commission, I issue the following determination on the merits of the subject charge filed under Title VII of the Civil Rights Act of 1964, as amended.

Charging Party alleges that she was subjected to sexual harassment and retaliated against in violation of Section 704(a) of Title VII of the Civil Rights Act of 1964, as amended in that she filed a claim of sexual harassment and discharged. Specifically, Charging

Party states that after having engaged in a consensual relationship with a co-worker which ended, he began inviting her out, tried to renew the relationship and attempted to extort money from her. (1) Charging Party states that after filing a formal complaint with Human Resources she was terminated in retaliation.

It is undisputed that Charging Party was engaged in a consensual relationship with a co-worker and that the relationship had been terminated.

The record of evidence showed that Charging Party was discharged because of improper use of E-mail and the filing of unfounded claims of business improprieties against the same individual she alleged harassed her. The record showed that Charging Party and this individual had been previously counselled in April of 1992 regarding improper use of E-mail and with respect to keeping

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(1) Charging Party alleged incidents that occurred more than 300 days from the filing of the instant complaint and were not addressed during the investigation.

personal matters out of the workplace.

There is no evidence to support that Charging Party was sexually harassed or terminated in retaliation for complaining about sexual harassment.

Thus, I have determined that the evidence obtained during the investigation does not establish a violation of the statute.

This determination and dismissal concludes the processing of this charge. This letter will be the only notice of dismissal and the only notice of the Charging Party's right to sue sent by the Commission. Following this dismissal, the Charging Party may only pursue this matter by filing suit against Respondent(s) named in the charge within 90 days of receipt of this letter. Otherwise the Charging Party's right to sue will be lost.

You are reminded that Federal law prohibits retaliation against persons who have exercised their right to inquire or complain about matters they believe may violate the law. Discrimination against persons who have cooperated in Commission

investigations is also prohibited. These protections apply regardless of the Commissions's determination on the merits of the charge.

On Behalf of the Commission:

/s/ Spencer H. Lewis, Jr.

District Director

Jan. 17, 1995

Date

CC: Information Sheet on Filing suit in Federal District Court